

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

TERA A. McMILLIAN,)
)
Plaintiff,)
)
v.) CASE NO.: 2:07:cv-001-WKW
)
ALABAMA DEPARTMENT OF)
YOUTH SERVICES, *et. al.*,)
)
Defendants.)

**DYS RESPONSE TO PLAINTIFF'S MOTION IN LIMINE (DOC. 117) TO EXCLUDE
HEARSAY AND OTHER EVIDENCE RELATED TO CREDIBILITY ON THE
PLAINTIFF OR TO THE ULTIMATE ISSUE IN THIS ACTION**

Comes now the Defendant Department of Youth Services and responds to the Plaintiff's Motion in Limine to Exclude Hearsay and Other Evidence related to Credibility of the Plaintiff or the Ultimate Issues in this Action. In opposition to the motion the Department submits the following:

Technically speaking, a prior judgment is hearsay. However, the question here is whether an exception exists for a prior judgment to be admissible as evidence. *See*, Hiroshi Motomura, *JUDGMENTS AS EVIDENCE*, 70 Minn. L. Rev. 979. The Department submits that the use of the judgment in this case as evidence is a favorable alternative to the use of the judgement as a basis for res judicata or collateral estoppel and that the administrative rulings are admissible under Fed. R. Evid. 803(8).

Rule 803(8) provides a hearsay exception for:

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . (C) in civil actions and proceedings and against the Government in criminal cases, factual

findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

FED. R. EVID. 803(8). The rule is premised on “the assumption that a public official will perform his duty properly and the likelihood that he will remember details independently of the record.” FED. R. EVID. 803(8) (C) advisory committee note.

The Plaintiff has offered no information or circumstances to show that the Hearing Officer’s findings and the Board’s Order lacks credibility. Accordingly, it is admissible pursuant to Fed. R. Evid. 803(8).

Counsel for Plaintiff in this case filed a motion for partial summary judgment (Doc. 25) based *res judicata* and collateral estoppel. The motion was based on the evidence she now seeks to exclude. The Plaintiff’s technical argument was that the administrative proceeding established that Tera McMillian was a victim of sexual harassment in violation of Title VII. DYS argued, and this Court agreed, that DYS did not take a position in the administrative case different from the position DYS takes in this case.

Plaintiff correctly argues that she was not a party to the administrative proceeding. However the Plaintiff also argues that she was not represented by counsel. Attached hereto as exhibit 1 is an excerpt from Ms. McMillian’s deposition in the administrative matter wherein her attorney was present and wherein it was clearly established that Ms. McMillian had her own attorney. Ms. McMillian had an interest in that administrative proceeding and her interest was substantially identical to her interest in this matter. Specifically, she contended that Michael Hardy had sexually harassed her, in violation of Title VII even though DYS took a different position, and she had the assistance of her attorney. That he did not appear at the final administrative hearing to cross examine the witnesses does not change the fact that she was

represented in that matter and had the opportunity.

Nevertheless, DYS does not submit that the findings and orders collaterally estop the Plaintiff. DYS submits that they are proper evidence to be given substantial weight. The closest analogy regarding the proper use of such administrative findings and orders appears to be the text of 42 USC § 2000e-5(b). The EEOC is required to give “substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local [employment discrimination] law.” 42 U.S.C. § 2000e-5(b). The Sixth Circuit has adopted this standard with regard to the answer to the question of the proper weight given to an administrative ruling in an employment discrimination case—the issue that is the subject of this motion. *See Cooper v Philip Morris, Inc.* 464 F2d 9 (6th Cir. 1972) (Sixth Circuit vacated the judgment of the District Court and remanded for an evidentiary hearing during which the District Judge shall “accord substantial weight to final findings and orders” previously entered in the premises by the Kentucky Human Rights Commission), mentioned in *University of Tennessee v. Elliott*, 478 U.S. 788, 106 S.Ct. 3220 (1986).

The State of Alabama Personnel Board exists, in part, for the purpose of adjudicating claims of discrimination:

Any applicant or employee who has reason to believe that he has been discriminated against because of religious or political opinions or affiliations or race, sex, national origin, age or handicap in any personnel action may appeal to the State Personnel Board. . . If the Board finds after hearing that there was discrimination on any of the above non-merit factors, it shall order appropriate corrective action and its decision shall be final.

See, Rules of the State Personnel Board, Ala. Admin. Code 670-X-4.03.

The Board’s rulings in claims under 42 USC 1983 are preclusive. However the Plaintiff’s claim against DYS is a Title VII claim. In *University of Tennessee v. Elliott*, 478 U.S.

788, 106 S.Ct. 3220 (1986), the Supreme Court considered whether unreviewed administrative rulings are preclusive in Title VII cases. The Court held not.

However the question here is the evidentiary weight such administrative orders should receive. Generally speaking, an agency fact finding can collaterally estop the court as to factual issues. *Pantex Towing Corp. v. Glidewell*, 763 F.2d 1241, 1245 (11th Cir.1985).¹ Collateral estoppel will apply to preclude relitigation of fact issues if:

- (1) there is identity of the parties or their privies; (2) there is identity of issues; (3) the parties had an adequate opportunity to litigate the issues in the administrative proceeding; (4) the issues to be estopped were actually litigated and determined in the administrative proceeding; and (5) the findings on the issues to be estopped were necessary to the administrative decision.

Id., 763 F.2d 1241, 1378-1380. Tera McMillian was represented by an attorney in the Michael Hardy personnel proceeding and the issues in which she was interested were substantially identical. Specifically, whether she was involved in a relationship with Michael Hardy and whether she had credibility. DYS thus submits that because the administrative findings and orders are not preclusive, in lieu of *res judicata* or collateral estoppel the documents should be admitted under Fed. R. Evid. 803(8).

WHEREFORE, DYS submits that the administrative hearing officer's findings, the order of the State Personnel Board, and the order of the Circuit Court in connection with the Michael Hardy administrative proceeding are admissible evidence under Fed. R. Evid. 803(c).

Respectfully submitted,

¹ Again, in light of *University of Tennessee v. Elliott*, 478 U.S. 788, 106 S.Ct. 3220 (1986), DYS does not argue *res judicata* or collateral estoppel, but argues that the proper alternative is admission into evidence of the findings and orders which were the basis of Plaintiff's partial motion for summary judgment (Doc. 25).

s/ T. Dudley Perry Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of July, 2008, I electronically filed the foregoing, RESPONSE TO PLAINTIFF'S MOTION IN LIMINE (DOC. 117) TO EXCLUDE HEARSAY AND OTHER EVIDENCE RELATED TO CREDIBILITY ON THE PLAINTIFF OR TO THE ULTIMATE ISSUE IN THIS ACTION with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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s/ T. Dudley Perry Jr.
T. Dudley Perry, Jr.

Exhibit 1

Excerpt of Deposition of Tera McMillian
in the Michael Hardy Administrative Proceeding

Michael Hardy
Tera McMillian

v.

DYS, et al
March 23, 2006

1 BEFORE THE PERSONNEL BOARD OF THE
2 STATE OF ALABAMA

3
4 IN RE: THE MATTER OF

5

6 MICHAEL HARDY

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12 THE DEPOSITION OF TERA MCMILLIAN was taken
13 pursuant to stipulation and agreement before
14 Shannon P. Yost, Certified Shorthand Reporter and
15 Commissioner for the State of Alabama at Large,
16 at the Alabama Education Association, 422 Dexter
17 Avenue, Montgomery, Alabama, on the 23rd day of
18 March, 2006, commencing at 9:15 a.m.

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21 * * * * *

22

23

Michael Hardy
Tara McMillian

V.

DYS, et al.
March 23, 2006

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1	(At which time, the referred-to document was marked as Employee's Exhibit No. 1 by the Reporter.)	1 represent Ms. McMillian.
2		2 Q And that's my understanding, that Mr. Perry
3		3 represents the Department of Youth Services,
4		4 and Mr. Cooks would be the one to represent
5	Q Let me show you what I've marked as Plaintiff's Exhibit No. 1 and ask you if you have seen a copy of that document?	5 you.
6		6 A Yes.
7		7 Q Okay. But he did not object to you coming
8	A I have.	8 to this deposition?
9	Q Okay. When did you see it?	9 A No, he did not.
10	A Day before yesterday.	10 Q He did not. Okay.
11	Q And how did you receive it?	11 MR. PERRY: Hold on a minute,
12	A Through the mail.	12 Theron. Let me think about it a
13	Q Through the mail. Okay. When you received that document, were you aware that that gave you a notice of a deposition scheduled for today?	13 minute. It's not my deposition,
14		14 and I don't have any authority to
15		15 control the deposition. However,
16		16 I don't want to be perceived as
17	A Yes, sir.	17 having communicated with
18	Q Did you share — at the present time, are you represented by an attorney?	18 Mr. Cooks' client without his
19		19 consent. And if this creates a
20	A Yes, I am.	20 tricky situation, if Mr. Cooks is
21	Q And who is that attorney?	21 opposed to the deposition without
22	A Roderick Cooks.	22 his presence, then I want him here
23	Q Roderick Cooks. And where is he located?	23 because I do not want any
	Page 7	Page 9
1	A Birmingham, Alabama.	1 perception that either he or his
2	Q Do you know what law firm he's with?	2 client is relying on me or my
3	A At this point, no, sir.	3 presence for Ms. McMillian because
4	Q You don't? Okay. After you got that notice, did you inform Mr. Cooks that you	4 I do not represent Ms. McMillian.
5	had received that notice?	5 I cannot represent Ms. McMillian.
6	A I did.	6 MR. STOKES: Yeah. I
7	Q And when did you inform Mr. Cooks?	7 understand your position, but I
8	A Yesterday.	8 think she said Mr. Cooks didn't
9	Q Yesterday? And what, if anything, did	9 oppose her coming to a deposition.
10	Mr. Cooks say regarding that deposition	10 Let's go off the Record for a
11	notice?	11 minute.
12	A Make sure that I be here on time.	12 (Off the Record.)
13	Q Okay. Did he say whether or not he wanted	13 MR. STOKES: We're going to
14	15 to be present?	14 take a recess and call Mr. Cooks
16	A Well, he wanted to be present, but I think	15 and see can we get in touch with
17	18 Mr. Perry — he said that Mr. Perry would be	16 him and get his position regarding
18	here. So that would be okay.	17 going forward with this
19	Q Do you know whether or not he talked to	18 deposition.
20	21 Mr. Perry about it?	19 (At which time, a break was
21	A I'm not sure, but I would assume.	20 held.)
22	MR. PERRY: No, I have not	21 MR. STOKES: Mr. Cooks, for
23	spoken with him, and I do not	22 the Court Reporter, why don't you
		23 give her your name, your address,

3 (Pages 6 to 9)

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Tera McMillian

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1	and what firm you're with.		1 name and address.
2	Mr. Cooks?		2 A Tera McMillian, 312 Adler Drive, A-D-L-E-R,
3	MR. COOKS: Yes, sir.		3 Montgomery, Alabama 36116.
4	MR. STOKES: Would you give		4 Q And how long have you lived at that address?
5	the Court Reporter your name and		5 A For about three years.
6	address and the firm you're with?		6 Q Prior to living at that address, where did
7	MR. COOKS: Roderick T.		7 you live?
8	Cooks, and I'm with the firm of		8 A 4110 Fitzpatrick Boulevard, Montgomery
9	Winston, Cooks, LLC.		9 36116.
10	Q Ms. McMillian, Mr. Cooks represents you; is		10 Q And how long did you live there?
11	that correct?		11 A For about three years, three or four years.
12	A Yes, sir.		12 Q Three or four years. Again, you received
13	Q And Mr. Cooks is presently here via		13 what I have marked as Plaintiff's Exhibit
14	telephone and participating in this		14 No. 1 -- Defendant's Exhibit No. 1. Have
15	deposition. So if I ask you any questions		15 you seen that document before?
16	that you --		16 A Yes, sir.
17	MR. COOKS: Ms. McMillian?		17 Q And is that a notice of deposition?
18	THE WITNESS: I'm here.		18 A Yes, sir.
19	MR. COOKS: Okay. Great.		19 Q And when did you receive it?
20	Q If I ask any question that you feel		20 A Day before yesterday.
21	uncomfortable or you'd like to stop, pause		21 Q Okay. After receiving that, what, if
22	and refer to your counsel before answering,		22 anything, did you do with it?
23	please stop me at any time and ask me to do		23 A What did I do with it?
1	so. Okay?		
2	A Yes.		1 Q Did you notify or discuss it with your
3	Q Hopefully, I'm going to ask you some		2 attorney?
4	questions that pertain to this lawsuit. If		3 A Yes. I called him to let him know that I
5	I ask you a question and you don't		4 had received it.
6	understand or would like for me to rephrase,		5 Q Okay. And that's Mr. Cooks who's on the
7	please stop me at any time and ask me to do		6 phone now?
8	so. Okay? If I ask you a question and you		7 A Yes, sir.
9	don't understand the words, group of words		8 Q And he had no objection to you attending
10	in the question, please stop me at any time		9 this deposition?
11	and ask me to explain, clarify, or define		10 A No, sir.
12	that which you do not understand Okay?		11 Q Okay. Could you give me your educational
13	A Okay.		12 background starting with your high school
14	Q Last but not least, if I ask you a question		13 diploma?
15	and you answer it --		14 A Yes. I have an advanced diploma.
16	MR. COOKS: Theron, could you		15 Q Where did you finish high school?
17	speak up?		16 A Wilcox Central High, Camden, Alabama.
18	MR. STOKES: Okay.		17 Q And what year did you finish school?
19	Q If I ask you a question and you answer it,		18 A 1991.
20	I'm going to assume that you understood the		19 Q After Wilcox, where did you go to school?
21	question.		20 A Alabama State University.
22	A Okay.		21 Q What year did you start Alabama State?
23	Q We're going back over again -- give me your		22 A 1991.
			23 Q 1991? Did you graduate?

4 (Pages 10 to 13)

